

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-rdd

4 - - - - - x

5 In the Matter of:

6

7 SEARS HOLDINGS CORPORATION, et al.,

8

9 Debtors.

10 - - - - - x

11

12 United States Bankruptcy Court

13 300 Quarropas Street, Room 248

14 White Plains, NY 10601

15

16 March 25, 2022

17 10:11 a.m.

18

19

20

21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: JUSTIN WALKER

1 HEARING re Notice of Hearing on Transform Holdco LLC's
2 Motion to Enforce the Order (I) Authorizing Assumption and
3 Assignment of Lease With MOAC Holdings LLC and (II) Granting
4 Related Relief (related document(s)10348, 10358) filed by
5 Rachel Ehrlich Albanese on behalf of Transform Holdco LLC.
6 (ECF #10359)

7
8 HEARING re Motion to Compel / Motion to Enforce the Order
9 (I) Authorizing Assumption and Assignment of Lease with MOAC
10 Mall Holdings LLC and (II) Granting Related Relief filed by
11 Richard A. Chesley on behalf of Transform Holdco LLC (ECF
12 #10194)

13
14 HEARING re Transcript regarding Hearing Held on 02/24/2022
15 At 10:05 AM RE: Notice Of Presentment Of Order Authorizing
16 Certain Distributions.; Letter / Notice Of Limited Remand.;
17 Notice Of Hearing On Scheduling Order For Transform Holdco
18 LLC's Motion To Enforce The Order (I) Authorizing Assumption
19 And Assignment Of Lease With MOAC Mall Holdings LLC And (II)
20 Granting Related Relief.; Etc. Remote electronic access to
21 the transcript is restricted until 5/31/2022. (ECF #10337)

22
23
24
25

1 HEARING re Objection to Motion to Enforce the Order (I)
2 Authorizing Assumption and Assignment of Lease with MOAC
3 Mall Holdings LLC and (II) Granting Related Relief (related
4 document(s)10194) filed by Gregory S. Otsuka on behalf of
5 MOAC Mall Holding LLC. (ECF #10230)
6
7 HEARING re Reply to Motion - Reply in Support of Motion to
8 Enforce the Order (I) Authorizing Assumption and Assignment
9 of Lease with MOAC Mall Holdings LLC and (II) Granting
10 Related Relief (related document(s)10194) filed by Richard
11 A. Chesley on behalf of Transform Holdco LLC. (ECF #10233)
12
13 HEARING re Objection of MOAC Mall Holdings LLC to Subject
14 Matter Jurisdiction with Respect to Transform Holdco LLC's
15 Motion to Enforce the Order Authorizing Assumption and
16 Assignment of Lease with MOAC Mall Holdings LLC (related
17 document(s)10194) filed by Gregg M. Galardi on behalf of
18 MOAC Mall Holdings LLC. (Attachments: # 1 Exhibit A -
19 Proposed Form of Order # 2 Exhibit B - District Court Appeal
20 Dismissal Order # 3 Exhibit C - Transforms Motion to Toll
21 Deadline (2nd Cir) # 4 Exhibit D - Second Circuits Order
22 Tolling Deadline # 5 Exhibit E - Second Circuit Summary
23 Order Affirming Dismissal # 6 Exhibit F - Second Circuit
24 Order Granting Stay # 7 Exhibit G - January 20, 2022 Hearing
25 Transcript # 8 Exhibit H - Transforms Motion Requesting

1 Clarification (2nd Cir) # 9 Exhibit I - MOAC Limited
2 Opposition to Transform's Motion Requesting Clarification #
3 10 Exhibit J - Second Circuit Remand Order # 11 Exhibit K -
4 February 24, 2022 Hearing Transcript) (ECF #10348)
5
6 HEARING re Affidavit of Service of Nova A. Alindogan
7 (related document(s)10348) Filed by Gregg M. Galardi on
8 behalf of MOAC Mall Holdings LLC. (ECF #10349)
9
10 HEARING re Reply to Motion - Reply in Support of Motion to
11 Enforce the Order (I) Authorizing Assumption and Assignment
12 of Lease with MOAC Mall Holdings LLC and (II) Granting
13 Related Relief (related documents)10194) filed by Richard A.
14 Chesley on behalf of Transform Holdco LLC. (ECF #10358)
15
16 HEARING re Response / (Corrected) Reply in Support of
17 Objection of MOAC Mall Holdings LLC to Subject Matter
18 Jurisdiction with Respect to Transform Holdco LLC's Motion
19 to Enforce the Order Authorizing Assumption and Assignment
20 of Lease with MOAC Mall Holdings LLC (related
21 document(s)10194, 10348) filed by Gregg M. Galardi on behalf
22 of MOAC Mall Holdings LLC. (ECF #10366)
23
24
25

1 HEARING re Response / Reply in Support of Objection of MOAC
2 Mall Holdings LLC to Subject Matter Jurisdiction with
3 Respect to Transform Holdco LLC's Motion to Enforce the
4 Order Authorizing Assumption and Assignment of Lease with
5 MOAC Mall Holdings LLC (related document(s) 10194, 10348)
6 filed by Gregg M. Galardi on behalf of MOAC Mall Holdings
7 LLC. (ECF #10365)

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

2

3 WEIL, GOTSHAL & MANGES, LLP

4 Attorneys for the Debtor

5 767 Fifth Avenue

6 New York, NY 10153

7

8 BY: PHIL DIDONATO (TELEPHONICALLY)

9

10 ROPES & GRAY LLP

11 Attorneys for MOAC Mall Holdings LLC

12 1211 Avenue of the Americas

13 New York, NY 10036

14

15 BY: GREGG GALARDI (TELEPHONICALLY)

16 ANDREW DEVORE (TELEPHONICALLY)

17

18 DLA PIPER

19 Attorneys for Transform Holdco and MOAC

20 1251 6th Avenue

21 New York, NY 10020

22

23 BY: RACHEL EHRLICH ALBANESE (TELEPHONICALLY)

24

25

1 P R O C E E D I N G S

2 THE COURT: Okay, good morning. We're here in In
3 re Sears Holdings Corporation. There's really only one
4 matter before the Court today, although there are many
5 aspects of that matter listed on the calendar.

6 This hearing is being held remotely by Zoom,
7 unless someone doesn't have access to a screen, in which
8 case, they're appearing by phone.

9 Why don't I take the parties' appearances first.

10 MS. ALBANESE: Good morning, Your Honor. Rachel
11 Ehrlich Albanese of DLA Piper on behalf of Transform.

12 THE COURT: Good morning.

13 MR. GALARDI: Good morning, Your Honor. Gregg
14 Galardi on behalf of Mall of America, and I also have Andrew
15 Devore in case -- I am in an airport and I get cut off,
16 Andrew will follow me.

17 THE COURT: Okay, very well.

18 MR. DiDONATO: Good morning, Your Honor. Phil
19 DiDonato, Weil, Gotshal & Manges, for the Debtors.

20 THE COURT: Okay, good morning.

21 All right. We're here in the most recent step in
22 a dispute between Transform Holdco and Mall of America Co.,
23 which I may sometimes refer to as MOAC, that originated in
24 2019 when MOAC objected to the assumption and assignment of
25 a long-term ground lease of substantial space in the Mall of

1 America in Minnesota by the Debtor Sears to Transform
2 Holdco.

3 The Court held a hearing on that objection on
4 August 23, 2019, and after that hearing entered an order
5 authorizing the assumption and assignment of the Mall of
6 America lease to Transform on the terms and conditions of
7 that order, which is dated September 5, 2019.

8 There has been a long and unexpectedly convoluted
9 appellate history following the entry of that order
10 culminating -- and I just want to confirm this, Mr. Galardi,
11 insofar at least a petition for certiorari by MOAC to the
12 Supreme Court.

13 MR. GALARDI: Correct, Your Honor. That was filed
14 on March 17th of this year.

15 THE COURT: Okay, very well. Particularly
16 relevant to the dispute before me today is a provision of
17 the assumption and assignment order, the September 5, 2019
18 order. In Paragraph 17 of that order, which states, "Solely
19 in connection with the designated lease and notwithstanding
20 anything to the contrary in Paragraph 13 or 16 hereinafter,
21 upon the entry of this order, the buyer will operate in
22 compliance with the designated lease, including but not
23 limited to the uses section of the designated lease and the
24 amended and restated reciprocal easement and operating
25 agreement Mall of America, Burlington, Minnesota dated May

1 30, 1991 between Sears Roebuck & Co., Mall of America Co.,
2 Nordstrom, Inc., and Macy's California."

3 Now here's the key sentence in that paragraph,
4 "Notwithstanding the foregoing, the buyer must initially
5 sublet a portion of the premises for the designated lease
6 within two years on the condition that the counterparty to
7 the designated lease does not improperly interfere with the
8 buyers' attempt to sublet the premises for the designated
9 lease."

10 As it's clear to me from my review of the
11 transcript of the August 23, 2019 hearing in which I
12 considered the motion to assume and assign and this
13 particular lease and MOAC's objection to it, that two-year
14 limitation, which does not appear in the lease itself, was
15 imposed by me as a condition of adequate assurance of future
16 performance in light of the remaining length of the lease --
17 approximately 70 years -- and Transform's acknowledgement
18 that it itself would not be operating in the space.

19 I was concerned that it would not be equitable or
20 consistent with Section 365 of the Bankruptcy Code for an
21 assignee like Transform to have the right simply to keep the
22 space empty during such a long period to the detriment of
23 the lessor, so I imposed what I believed at the time would
24 be a reasonable limitation on Transform's professed
25 statement that it believed it would be able to obtain a new

1 tenant within a reasonable time, or at least for a portion
2 of the premises within a reasonable time. And I concluded
3 then that two years would be a reasonable time as long as,
4 as stated in Paragraph 17 of the order, the landlord does
5 not improperly interfere with the attempt to sublet the
6 premises by Transform.

7 Because of twists and turns in the appellate
8 process, there was a substantial risk that that two-year
9 period would run before there would be a final order in
10 respect of the assumption and assignment. Because of that
11 risk, the Second Circuit entered an order granting
12 Transform's motion tolling the deadline to sublet, "for an
13 additional 60 days after this Court, i.e. the Second
14 Circuit, enters its decision regarding the appeal."

15 The Court did enter its decision affirming the
16 District Court's decision under Section 363(m) of the
17 Bankruptcy Code upholding the assumption and assignment.
18 And in the meantime, Transform, it is agreed, had found a
19 prospective subtenant, but the lease agreement with the
20 subtenant included a condition that there not be pending
21 litigation over the assignment of the lease.

22 And MOAC expressed its intention, now fulfilled,
23 to seek certiorari of the Second Circuit's ruling on the
24 merits of the appeal to the Supreme Court. That resulted in
25 three things.

1 First, Transform made a motion before this Court
2 for a determination as to Paragraph 17 and the conforming
3 nature of the proposed sublease under the assumed and
4 assigned lease with MOAC.

5 Secondly, MOAC moved in the Second Circuit for a
6 stay of the issuance of the Court's mandate pending the
7 filing disposition of a petition for writ of certiorari, a
8 motion that ultimately was granted by the Circuit.

9 The Court, that is this Court, heard Transform's
10 motion, which was opposed by MOAC, in January of this year.
11 MOAC's opposition was primarily based upon its assertion
12 that in light of the pending appeal where the mandate had
13 not been issued, the Court was divested of jurisdiction over
14 Transform's motion invoking Bankruptcy Rule 8008 and
15 focusing on the most pressing issue and I think the issue
16 that prompted Transform's motion ultimately, the two-year
17 deadline, and the potential that the Circuit's 60-day
18 tolling stay would expire in the light of the cert petition.

19 I gave an indicative ruling in which I stated that
20 I believed that my order clearly did not contemplate the
21 convoluted and lengthy appellate process but was focused on
22 the requirement as an aspect of adequate assurance of future
23 performance, under Section 365 that is, that Transform
24 sublet at least a portion of the premises within a
25 reasonable time and stated that that would be my ruling and

1 that, at least to the proposed subtenancy agreement, that
2 would seem to me to be a reasonable time.

3 The Circuit, when apprised of the indicative
4 ruling as Rule 8008 requires, which it was apprised of in
5 the context of a motion by Transform to either issue its own
6 stay or tolling of the running of the 60-day deadline or, in
7 the alternative, a remand on the issue of the two-year
8 deadline and my ability to actually issue a ruling
9 consistent with the indicative ruling, issued an order on
10 February 16 -- well, I'm sorry, the certified copy was
11 issued on February 16, and the order was issued earlier --
12 issued an order that states that pursuant to Federal Rules
13 of Appellate Procedures 6 and 12.1, this Court remands to
14 the Bankruptcy Court for the limited purpose of ruling on
15 the issue of the two-year deadline. The deadline contained
16 in the August 17, 2021 order, that is the 60-day deadline,
17 is tolled until the Bankruptcy Court's resolution of this
18 issue. The Court otherwise retains jurisdiction over this
19 appeal.

20 Thereafter, in connection with that remand,
21 Transform proposed a scheduling order in which it
22 contemplated the Court's determination not only of how
23 Paragraph 17 and its two-year period should be interpreted
24 in light of the Court's indicative ruling and the remand,
25 but also issues pertaining to Transform's compliance with

1 the lease as per the proposed sublease agreement and/or
2 MOAC's non-compliance with it and hinderance of entry into
3 the sublease agreement in an improper way.

4 In response, MOAC, which had previously just
5 raised the divestiture doctrine as an objection to the
6 Court's jurisdiction, for the first time objected to the
7 Court's subject matter jurisdiction over those issues as
8 well as because of an asserted lack of subject matter
9 jurisdiction, the Court's in personam jurisdiction over
10 MOAC.

11 We held a hearing on the objection to the proposed
12 pretrial order on February 24, 2022, in which I noted the
13 two issues that the proposed pretrial order sought the Court
14 to determine, namely whether there are any limitations under
15 the lease with respect to this proposed subtenant and
16 whether the right of first offer in Article 6 of the lease
17 has been properly exercised or not by MOAC.

18 The original motion also sought a determination of
19 whether the so-called litigation contingency in the proposed
20 sublease that there not be any pending litigation has been
21 satisfied but Transform acknowledged that given the pendency
22 of the appellate process with the request for certiorari or
23 the petition for certiorari, that issue would not be
24 decidable by the Court at this time.

25 I noted at the February 22 hearing that -- I'm

1 sorry -- February 24, 2022 hearing that Transform's reply to
2 MOAC's objection, and in particular its jurisdictional
3 objections, really didn't delve into those objections, but
4 simply assumed from remarks that I had made during the
5 January hearing that I'd already ruled that I had
6 jurisdiction.

7 I made it clear at the February 24 hearing that
8 that was not the case, that the jurisdictional issues raised
9 by MOAC were serious ones that needed to be addressed and
10 that there should be additional submissions on them, as well
11 as if the parties couldn't agree on the form of proposed
12 order in light of my indicative ruling, submissions
13 addressing that proposed order. And again, that was, I
14 think, the focus of the remand.

15 So that's about a 15-minute explanation of where
16 we are today. I have received an initial pleading by
17 counsel for MOAC on the jurisdictional points that it
18 actually had previously raised, but that are raised again in
19 that pleading dated August 9. I have Transform's response
20 to that pleading, and I have MOAC's response.

21 I actually want to start with the second issue
22 that I said we would be dealing with today when we discussed
23 this on February 24, which is the two parties' respective
24 versions of the proposed order. They're quite different.

25 The proposed order that Transform would seek would

1 state in its first decretal paragraph, "Transform has
2 initially sublet a portion of the premises for a designated
3 lease within two years, thereby satisfying the two-year
4 sublease deadline set forth in Paragraph 17 of the
5 assignment order."

6 The proposed order attached to MOAC's reply dated
7 March 23 states in the first decretal paragraph, "By
8 agreement of MOAC, the adequate assurance sublet deadline,
9 which is the Paragraph 17 deadline, contained in the final
10 sentence of Paragraph 17 of the assignment order shall not
11 apply to the proposed sublease."

12 Paragraph 2 states the adequate assurance sublet
13 deadline is hereby amended and clarified and superseded in
14 its entirety as follows. "In the event that the proposed
15 sublease as defined in this order is not consummated, the
16 buyer must initially sublet a portion of the premises for
17 the designated sublease within a reasonable time following
18 the conclusion of MOAC's appeals of the assignment order on
19 the condition that the counterparty to the designated lease
20 does not improperly interfere with the buyer's attempt to
21 sublet the premises for the designated lease."

22 It then goes on to say, "All parties rights are
23 reserved regarding such reasonable time period following the
24 conclusion of such appeals, which period shall not exceed
25 two years following the conclusion of such appeals." This

1 Court will determine what a reasonable time period is for
2 the foregoing requirement based on the facts and
3 circumstances at that time and upon appropriate motion by
4 either party in the event that the proposed sublease, that
5 is the currently proposed sublease, is not consummated.

6 So I want to get that out on the table. I want to
7 make sure that the parties are still proposing those two
8 alternative versions. There's been no further developments
9 on them.

10 MS. ALBANESE: That is correct, Your Honor.

11 THE COURT: Okay.

12 MR. GALARDI: That's correct.

13 THE COURT: Okay, all right. So I think then
14 knowing what each side thinks the proposed order should be
15 on remand, I will turn to the jurisdictional issues. And
16 again, I've read the parties' pleadings, which I think lay
17 them out clearly and thoroughly, have I think pretty clear
18 views on the outcome here in light of those pleadings, but
19 I'm happy to hear brief oral argument if either of you wants
20 to do that.

21 I think we're ultimately here on the
22 jurisdictional issues raised by MOAC, but the party
23 asserting jurisdiction has the burden of proof, so I think I
24 should hear from Transform first.

25 MS. ALBANESE: Thank you, Your Honor. I'd be

1 happy to make a brief statement on the jurisdictional claim.

2 THE COURT: Okay.

3 MS. ALBANESE: Thanks. As Your Honor noted at the
4 outset, we're here today in the Second Circuit's
5 (indiscernible) for the limited purpose of ruling on the
6 issue of the two-year deadline.

7 That deadline arises in Paragraph 17 of the
8 assignment order, which provides that Transform must
9 initially sublet a portion of the premises by the designated
10 lease within two years. Because that deadline is a creature
11 of Your Honor's order and it's not found elsewhere in the
12 designated lease or the lease documents, it's clear that
13 Your Honor has subject matter jurisdiction over the issue of
14 the two-year deadline and then (sound glitch) personal
15 jurisdiction over MOAC.

16 And I think that's all that Transform would say on
17 the topic, Your Honor.

18 THE COURT: Okay. I guess, I mean, I have two
19 basic issues with that assertion. The first is that the
20 aspect of my order over which I would have jurisdiction, and
21 I think there's no doubt about that and I don't think MOAC
22 disputes that I have jurisdiction to interpret and enforce
23 that order, MOAC contends is now not an issue, i.e. it has
24 agreed that as for the designated sublease or the proposed
25 sublease.

1 The applicable provision of the order, namely that
2 buyer must initially sublet a portion of the premises for
3 the designated lease within two years on the condition that
4 the counterparty of the designated lease does not improperly
5 interfere with buyer's attempt to sublet the premises for
6 the designated lease, is no longer an issue because that
7 two-year deadline doesn't apply to the sublease.

8 And furthermore, consistent with my indicative
9 ruling, the proposed order proposed by MOAC would leave open
10 for another day if the currently proposed sublease falls
11 through for some reasons, the Court's determination of what
12 would be a reasonable time to sublease in light of all of
13 the facts, and I would add consistent with the Court's
14 remarks about the purpose of this provision at the original
15 hearing in 2019 and in its indicative ruling.

16 So MOAC argues with I think some cogency that I'm
17 not being asked to interpret my order anymore. I'm instead
18 being asked to interpret the lease, which is a lease that's
19 in effect between the two non-debtor parties for which the
20 Debtors already received its consideration, so it doesn't
21 have a conceivable effect on the estate. It's also post-
22 confirmation, so there has to be a close nexus at least for
23 related to jurisdiction. It doesn't really arise in the
24 bankruptcy case because it doesn't pertain to any issue that
25 was necessary in the bankruptcy case itself.

1 And finally, and this is the second point, the
2 finding that I'm being asked to make in the proposed order
3 from Transform is one I simply can't make, which is that the
4 litigation contingency has been met. I mean, I think
5 Transform actually conceded that earlier. So to me, I don't
6 think that proposed order works, separate and apart from the
7 jurisdictional point.

8 I suppose if all of these issues were alive today
9 and you were contending that MOAC was trying to catch
10 Transform in the two-year deadline by raising them
11 improperly, i.e. improperly saying that the sublease
12 couldn't be entered into, I might have jurisdiction, but
13 it's not doing that in the context of the two-year deadline.
14 And so, to me, that doesn't -- because it's waived the two-
15 year deadline and offered up an order as to any other
16 subtenant that would put off that issue for a Court's
17 determination of reasonableness.

18 So I'm just going to throw all that out to you
19 because I think that's what I need you to address.

20 MS. ALBANESE: Okay. Thank you, Your Honor.

21 I think it's important to note that they haven't
22 given up on the two-year issue. They waived it as to this
23 subtenant, but they haven't said that it's satisfied. And
24 what we're talking about is --

25 THE COURT: But I don't understand that. They

1 have said it's satisfied. They've said that they won't
2 assert that two-year provision as to this subtenant.

3 MS. ALBANESE: Only as to this subtenant. And so,
4 the order that they're proposing would actually modify Your
5 Honor's assignment order. And, you know, from Transform's
6 perspective, that keeps the issue open. They want a second
7 bite at the apple of adequate assurance of future
8 performance when we've already complied with the plain terms
9 of Your Honor's assignment order.

10 The assignment order is --

11 THE COURT: It's two different things, so I want
12 to separate them. First, they're just, I think as to the
13 reasonableness point, they're proposing, and it is actually
14 consistent with my indicative ruling that as to other
15 situations that might arise in the future with other
16 prospective subtenants, the Court is guided by the ultimate
17 purpose of that two-year limitation, which is one that
18 ultimately comes down to what's a reasonable time for
19 Transform to have found a new tenant without improper
20 interference, so I'm not bothered by them offering that up.

21 It seems to me that's consistent with the purpose
22 that I proposed that two-year limitation in the first place.

23 MS. ALBANESE: And that's exactly like --

24 THE COURT: And on the second point on the
25 jurisdictional point, I guess I just don't -- I don't see

1 how -- it's not a jurisdiction, it's a fact point. I don't
2 see how I can say that all of the conditions of that
3 original Paragraph 17 have been met. I don't see how I can
4 do that.

5 MS. ALBANESE: It's not all of the conditions that
6 that original Paragraph 17. We're here on the two-year
7 limitation and that's what we're saying to be addressed.

8 THE COURT: I understand that. But again, that
9 provides that buyer must initially sublet a portion of the
10 premises within two years. So you're asking me to rule that
11 buyer has actually sublet a portion of the premises within
12 two years.

13 MS. ALBANESE: Your Honor, that's exactly --

14 THE COURT: I have a sublease that is subject to
15 conditions.

16 MS. ALBANESE: But, Your Honor, the assignment
17 order does not say must initially sublet a portion of the
18 designated premises within two years without contingencies.
19 Transform did exactly what it needed to do to address the
20 concerns that Your Honor mentioned by initially subletting,
21 entering into, a signed and valid and binding sublease for a
22 portion of the premises with the subtenant, exactly as
23 Paragraph 17 requires. The assignment order, as I said,
24 doesn't specify a contingency-free sublease, and that would
25 actually be impossible under the circumstances given the

1 pending appeal.

2 So it's also worth nothing that I'm sure MOAC
3 knows, contingencies are common in commercial leases, and
4 that's what we have here. We have a sublease that has some
5 contingencies given the pending appeal. But we've done what
6 we needed to do under the plain text of Paragraph 17.

7 THE COURT: But let's just leave it at that then,
8 okay? Let's assume that's the case. If that's the case,
9 then that argument is premised upon those contingencies
10 still being open, right, so I wouldn't have jurisdiction to
11 consider those contingencies, right, because Paragraph 17
12 has been satisfied.

13 But you're asking me actually to then go a step
14 further and decide whether those contingencies have occurred
15 or not, right?

16 MS. ALBANESE: We are not pursuing the master
17 lease compliance issues as I think MOAC refers to them.
18 We're here just to talk about have we met that two-year
19 deadline and not --

20 THE COURT: All right. I guess that's fair.
21 There wasn't -- I don't think there was a specific statement
22 in Transform's response that said we're not asking you to
23 determine the compliance issues or the right of first
24 refusal issues. And I think that's how -- and I think
25 you're right. I read MOAC's reply to say that you're not

1 looking for that anymore. But I had assumed that Paragraph
2 1 in Transform's proposed order was actually seeking a
3 determination that that sublease was effective.

4 MS. ALBANESE: It's not a back door approval of
5 the master lease compliance issues that we were proposing.

6 THE COURT: So basically if I entered your order,
7 there would be nothing more for me to do.

8 MS. ALBANESE: Correct.

9 THE COURT: Okay. All right.

10 MS. ALBANESE: And I think that's an important
11 point, Your Honor.

12 THE COURT: Okay. I appreciate that point, and I
13 guess a lightbulb just went off in my head that was just
14 sort of dimly flickering until then.

15 MS. ALBANESE: That's what every lawyer wants to
16 hear.

17 THE COURT: All right. So let me ask you, Mr.
18 Galardi, what's the problem with doing that as long as it's
19 clear and we can make it clear that my entering that order
20 with that paragraph in it doesn't affect any determination
21 on the so-called compliance issues, i.e. whether this is an
22 authorized subtenant and whether the right of first offer
23 was properly exercised.

24 MR. GALARDI: Because it's just --

25 THE COURT: That would be left for, you know, a

1 court with non-bankruptcy jurisdiction to decide.

2 MR. GALARDI: Your Honor, it's exactly what I
3 think Your Honor said: there is no fact to support it. That
4 particular proposed sublease has a condition that is not
5 satisfied. Now while there may be other --

6 THE COURT: But they entered into it. I mean --

7 MR. GALARDI: But take, for example, entering into
8 a sublease that says, well, we'll sublease; they did it
9 within two years. They entered into a sublease and the
10 subtenants says that's great, but I'm going to start the
11 lease year 69. This provision was not intended to simply
12 say execute a sublease with any conditions.

13 THE COURT: All right, but that's not what's
14 before me. I mean, this proposed sublease isn't playing
15 games with the occupancy of the property. You know, it's
16 not like they're flipping it to another Transform, which,
17 you know, would be using the same type of we'll leave a dark
18 leverage that --

19 MR. GALARDI: Again, Your Honor, I think this is
20 why we waived the condition, as opposed to prefer that
21 language. Now I understand Ms. Albanese has now clarified
22 it. But when you waive a condition, we're not enforcing
23 that they didn't do something in two years, but to say they
24 satisfied that condition with a contingency that is for Your
25 Honor to rule as a matter of fact today didn't --

1 THE COURT: No. I'm not going to rule on
2 anything. They just signed -- they entered into the
3 sublease.

4 MR. GALARDI: But, again, going back to your
5 order, Your Honor, it says on the condition that it had to
6 be within two years. If Your Honor is reading your order,
7 to initially sublease means to initially enter into a
8 sublease, as opposed to actually add a sublease of the
9 premises, I understand it. But I read that to be they
10 actually have a sublessor in the premises or a portion of
11 the premises as of within that two-year period.

12 They don't have that, they can't have it, and the
13 tenant will not take that -- will not be in that premises
14 within the two-year period. Well, we're willing to waive
15 that, but that is what I think Your Honor's order says.
16 They had to sublet it, actually sublet it, not enter into a
17 sublease. And you're actually saying they have a lease,
18 they've done it, they've satisfied that condition.

19 THE COURT: Okay, so I have a proposal for both of
20 you. And I guess I understand your point, Mr. Galardi, but
21 it seems that if we went with MOAC's proposed order, which
22 would have the waiver in Paragraph 1 and Paragraph 2 with
23 respect to the reasonable time point. One factor that
24 should be taken into account is the bona fides or not of the
25 designated lease as to reasonableness.

1 MS. ALBANESE: Your Honor, I think going back to
2 the MOAC order doesn't make sense because, as Your Honor
3 recognized, we have entered into a signed and binding
4 sublease.

5 THE COURT: Well, I mean, but it's binding with
6 conditions. I am reluctant to get -- I mean, since you
7 don't want me to determine the -- and I don't think I can
8 given the waiver point, whether those conditions are bona
9 fide or not, that's a back way -- it's a back door way of
10 deciding those conditions.

11 So I think the proper thing to do would be to
12 preserve fully in the order the point you're making, Ms.
13 Albanese, which is this lease may be perfectly -- this
14 current sublease may, in fact, satisfy Paragraph 17. It
15 didn't have to be waived. MOAC was giving you ice in winter
16 and, therefore, almost by definition, any future sublease,
17 you know, would be reasonable if it's entered into within a
18 reasonable time -- you know, if it's in light of the
19 arguable compliance with Paragraph 17 now.

20 But to ask me to decide the -- but, see, you're
21 not asking me to decide the compliance issues.

22 MS. ALBANESE: No, it's just the narrow question.
23 It's just the narrow question of was there an initial
24 sublease within the two-year period, and the answer is yes.
25 And so, everything else is not on --

1 THE COURT: But I think to answer that question, I
2 would have to delve into whether the sublease is, you know,
3 bona fide, is it real, does it create a --

4 MS. ALBANESE: Yes.

5 THE COURT: -- series of or any conditions that
6 just never would be granted, in essence, you know, is
7 entered into by Transform just to create optionality, you
8 know. Those are all, I think, fair points for MOAC to
9 raise. I read the sublease months ago now and, frankly, it
10 didn't seem to be that type of agreement, but that's not
11 dealt with me, and the parties aren't proposing to deal with
12 that by me.

13 MS. ALBANESE: I think that's all -- I'm sorry, go
14 ahead.

15 THE COURT: I think what you're saying is I should
16 define the term, enter into a sublease. I'm sorry, let me--

17 MS. ALBANESE: Initially sublet.

18 THE COURT: Initially sublet to mean enter into a
19 sublease or it could mean initially start an actual lease.
20 And I don't think -- to me, I understand your argument and I
21 agree with it, that it doesn't mean actually, you know,
22 start the lease so that the keys are turned over, possession
23 is granted, et cetera.

24 On the other hand, I agree with Mr. Galardi that
25 if you just read it to mean enter into a sublease, that's

1 too broad because that could be a sham lease; it could be
2 subject to conditions that everyone knows could not be
3 satisfied.

4 So I think that the proper result here would be to
5 defer on that issue for a later date if it ever arises,
6 which is whether the entry into the designated lease, just
7 the entry into it, satisfies Paragraph 17 or, alternatively,
8 there's an argument to be made that such a lease -- that
9 lease in particular rather was not one that would be, you
10 know, a bona fide transaction.

11 So I think the language in the MOAC order
12 Paragraph 1 should stand, and Paragraph 2 should be revised
13 to reflect that that issue is a gloss in which the Court
14 would be determining reasonableness for any future lease if
15 the designated lease is not actually one that the parties to
16 that lease actually enter into and perform.

17 MS. ALBANESE: Your Honor, what MOAC's order is
18 doing, and by convincing you that you meant something more
19 than I think the parties believe that you meant when you
20 came up with the adequate assurance of future performance
21 requirement, is getting themselves a free auction without a
22 bond to potentially deprive Transform of the designated
23 lease after it will have prevailed all the way up to the
24 Supreme Court.

25 THE COURT: Well, no, because -- first of all, as

1 far as the designated lease is concerned, that's not true
2 because they're saying that they're not applying the two-
3 year period to the designated lease.

4 MS. ALBANESE: Well, they say they're reserving on
5 the issue of the validity of the subtenant.

6 THE COURT: Well, yes, but not as to the two-year
7 period.

8 MS. ALBANESE: Right. But now they're saying that
9 they're going to have an additional two-year period when the
10 purpose of the initial sublet provision was to ensure that
11 Transform didn't sit on its hands. So we've done we need --

12 THE COURT: But, look, I've said this again, but
13 I'll use that language. It may well be that Transform
14 didn't sit on its hands, that it entered into a bona fide
15 sublease and the provision Paragraph 17 was therefore
16 complied with.

17 On the other hand, it is certainly conceivable to
18 me that there is a condition in that lease, which I have not
19 studied and which the parties have not really briefed
20 because these other issues came up, that means that the
21 lease is really illusory and it was just meant to satisfy
22 this provision, so that in the future, Transform could do
23 whatever it wants with the property, including leave it
24 vacant for the next 60 years.

25 No one has asked me to rule on that issue, and I

1 think it's proper that that issue be reserved in Paragraph 2
2 of the order in the event that the designated lease doesn't
3 go effective. The designated lease could go effective four
4 years from now, and it doesn't matter because they've waived
5 the two-year condition. If it doesn't go effective four
6 years from now, you can argue to me that it was a valid
7 lease and there really was no -- nothing illusory about it.
8 Transform had done everything that it could do; it wasn't
9 sitting on its hands.

10 And the new lease it's entering into is the same
11 way, so it's reasonable. And, of course, it won't be to me,
12 it'll be to some other bankruptcy judge, but that's why I
13 think the order needs to make it clear that your argument
14 that the designated lease complied with the two-year
15 provision is a key element of any future determination as to
16 whether the new lease in Paragraph 2 is within a reasonable
17 time.

18 I think that's a fair resolution to this and it
19 doesn't -- and it's consistent with the parties not now
20 neither of them asking me to determine the bona fides of the
21 sublease.

22 MS. ALBANESE: I have some concern, Your Honor,
23 with leaving open the question of a reasonable time, because
24 I think the Court can decide today that two years continues
25 to be a reasonable time to replace a subtenant if Transform

1 loses the current subtenant due to MOAC's proceedings. You
2 know, it's impossible to say what the market will look like
3 and what obstacles Transform will face.

4 THE COURT: I mean, I'm looking at this language
5 again.

6 MS. ALBANESE: Yeah. It's just got reasonableness
7 all over the place.

8 THE COURT: Let me look at it.

9 MS. ALBANESE: Okay.

10 THE COURT: I thought I had it here. So you're
11 focusing on the which period shall not exceed two years.

12 MS. ALBANESE: Yeah. Given the parties' history,
13 Your Honor, the language in this order basically guarantees
14 that the parties will be back here arguing about whether 200
15 or 500 or 730 days is a reasonable subsequent sublease
16 period. And as Your Honor noted, it won't be you who is
17 hearing it and dealing with that, but that is definitely
18 going to be a dispute that the parties have to face, so
19 better to prep that out and say that it's two years now.

20 Transform has been nothing but diligent and will
21 continue to be diligent, but there's no reason to deprive
22 them of the time in which they previously had to find a
23 subtenant which, as we've said, we've done.

24 MR. GALARDI: Your Honor, if I may just briefly.
25 One, as Your Honor I think acknowledged before, they have

1 been marketing it, they still are marketing it, and they
2 still are marketing it because they know that there is this
3 litigation contingency.

4 Our concern is to just simply automatically add
5 another two years when that was as a result of some
6 statement made on the record. And I do think we should have
7 a standard of reasonable, and if there is a concern during a
8 time period, they can certainly come back. This is for our
9 protection. Two years is likely to pass, and we would like
10 to be able to say no greater than two years but a reasonable
11 period, leaving it to the facts and circumstances, and
12 again, as long as we do not interfere.

13 THE COURT: Okay. So this is how I'm going to
14 deal with the order, and it would use the form proposed by
15 MOAC keeping Paragraph 1. And as far as Paragraph 2 is
16 concerned, picking up with the second sentence, I would say,
17 all parties rights are reserved regarding such reasonable
18 time period following the conclusion of such appeals, which
19 period shall not exceed two years following the conclusion
20 of such appeals on the condition that -- you know, on the
21 foregoing condition, i.e. the non-interference condition,
22 provided that the subletting within one year is reasonable,
23 and such interpretation of reasonableness for the period
24 between one year and two years shall be made in the light of
25 the purpose of the two-year limitation in Paragraph 17 of

1 the assumption and assignment order as construed by the
2 Court in its indicative ruling, and in the light of the
3 Court's assessment of the bona fides of the designated lease
4 -- I guess you defined as the proposed sublease -- of the
5 proposed sublease and whether Transform's entry into it
6 already satisfied Paragraph 17.

7 You could probably wordsmith that a little better,
8 but that's the idea.

9 So Ms. Albanese's argument is not only fully
10 preserved but it's actually front and center, as well as the
11 purpose of the time limit as originally provided with some
12 parameters around it. And I'm doing that because it really
13 is the timing issue that, as I said in the transcript for
14 the February 24 hearing, the jurisdictional hook for
15 Bankruptcy Court jurisdiction here.

16 I believe given the nature of this dispute, which
17 is between two non-debtors in respect of an already assumed
18 and assigned lease, the only basis for jurisdiction would be
19 a request to interpret and enforce my order, and that comes
20 down to the temporal provision in Paragraph 17.

21 The parties I think have come to the point where
22 that temporal provision is appropriately construed and
23 construed and consistent with the remand because that's also
24 a limitation on my jurisdiction. I can't go beyond the
25 remand, which was really the deal with my indicative ruling,

1 which again, dealt with two points: first, the designated
2 lease or the specified lease, as it's defined in the MOAC
3 form of order and, second, what happens if, for some reason,
4 that lease falls through, and not a determination of the
5 bona fides or the conditions to that lease, that designated
6 lease.

7 So that distinguishes this case once the temporal
8 issue is dealt with from Traveler's Indemnity Company v.
9 Bailey, 552 U.S. 137, 151 (2009), In re Petrie Retail, Inc.
10 304 F.3d 223 (2d Cir. 2002). Judge Gerber's lengthy
11 discussion of subject matter jurisdiction in In re Motors
12 Liquidation Co., 514 B.R. 377, 379 *8 (Bank. S.D.N.Y.
13 2014), affirmed A29 F.3 135 (2d Cir. 2016), and also his
14 discussion in In re. Ames Department Stores, Inc., 317 B.R.
15 260 (Bankr. S.D.N.Y. 2004). In those orders, the Court was
16 construing a previous ruling.

17 Here, the only previous ruling I'm even construing
18 is that temporal limitation in Paragraph 17, which this
19 order would do. And once that is done, I don't believe I
20 have arising in jurisdiction under 28 U.S.C. 1334. The
21 dispute would have existence outside of the bankruptcy in
22 that it's a lease dispute, not a dispute over the meaning of
23 my order.

24 You can read the formulation of arising in
25 jurisdiction in Baker v. Simpson, 613 F.3d 346, 351 (2d Cir.

1 2010), and other cases as creating a but for the bankruptcy,
2 there wouldn't be this dispute. But I don't think that's
3 the right way to take it because obviously things happen in
4 a bankruptcy like a sale, and yet, it's well recognized that
5 disputes that arise because a sale occurred, i.e. between
6 the new owner and somebody, could arguably be but for the
7 bankruptcy because the new owner wouldn't have owned the
8 property but for it, but that's not enough.

9 I appreciate I don't think the Second Circuit has
10 ruled as explicitly as the First Circuit on this, but I
11 would follow the discussion in Gupta v. Quincy Medical
12 Center, 858 F.3d 657, 663-65 on this (1st Cir. 2017), that
13 this dispute would arise only in the context of a
14 bankruptcy. So, for example, if the parties had reserved
15 for a future day determination of cure, that would -- well,
16 it would probably arising under as well, but that would be
17 arising in, for example.

18 While this Supreme Court and the Circuit's
19 definition of related to jurisdiction is quite broad, the
20 conceivable effect test laid out in Celotex Corp v. Edwards,
21 514 US 300, 308 *6 (1995) and by the Circuit in SPV Osus Ltd
22 v. UBS AG, 882 F.3d 333, 340-342 (2nd Cir. 2018).

23 Here, the sale has already happened, and no one
24 has really expressed to me how this dispute has a
25 conceivable effect on the estate. Moreover, it's a post-

1 confirmation dispute, and it's clear that the Bankruptcy
2 Court's jurisdiction is narrowed at that point unless it's
3 interpreting its own order.

4 The Circuit reserved whether the requirement of a
5 close nexus to the plan or integral provisions of documents
6 integral to the plan applies to core proceedings, as opposed
7 to just related proceedings. But at best, this would be
8 just a related to proceeding and not a core proceeding. So
9 post-confirmation, I don't see a basis for jurisdiction on a
10 subject matter basis, given the order proposed by MOAC and
11 as modified by as set forth herein.

12 I saw, and maybe I should get his agreement to
13 this, that those modifications are acceptable to Mr.
14 Galardi. I saw you nodding your head, but are those
15 modifications acceptable?

16 MR. GALARDI: Yes, Your Honor, they are
17 acceptable.

18 THE COURT: Okay. And as far as the post-
19 confirmation jurisdiction point, see Vanguard Products Corp.
20 v. Citrin (In re Indicon, Inc.), 645 F.App'x 39 *1 (2d Cir.
21 4/4/2016), where the Circuit says it's going to leave open
22 whether the close nexus test applies in core proceedings as
23 well as non-core because it didn't need to so there because
24 there was just non-core related to jurisdiction, which was
25 also the issue in CDR Creances S.A.S. (In re Euro-American

1 Lodging Corp), 549 F.App'x 52 (2d Cir. 2014). See also
2 (indiscernible) 2021 U.S. District Lexis 224031 at *6-7
3 (S.D.N.Y. 11/17/2021) as far as the articulation of the
4 close nexus case.

5 I know that Transform has stated that you can't
6 waive your way out of a dispute, citing Lewis Bros. Bakeries
7 Inc. v. Interstate Brands Corp. (In re Interstate Bakeries
8 Corp), 751 F.3d 955, 960 (8th Cir. 2013). But that's true
9 only where the waiver doesn't resolve the precise issue
10 before the Court, as noted by the Circuit in that ruling.

11 And here, again, the precise issue really is, as
12 set forth on the remand, which is what was the meaning and
13 intention of the temporal limitation in Paragraph 17, and
14 the waiver addresses that as to the immediate dispute over
15 the designated lease, and also I think for future purposes
16 addresses it for other potential subleases that would come
17 up in the future. And I think now that I've heard Ms.
18 Albanese's argument and considered it carefully, takes that
19 argument into account in that context.

20 So that's the order that I'll enter here, and I
21 think that does, in fact, dispose of the remand, so I think
22 you should give that order, or at least make the Circuit
23 aware of it and it probably should be on the record to the
24 Supreme Court if cert is granted.

25 I'll ask Mr. Galardi to mark up the order

1 consistent with how I've ruled, and you should run it by Ms.
2 Albanese to make sure that -- to give her the chance to make
3 sure it's consistent with my ruling, and then email it to
4 chambers.

5 MR. GALARDI: Will do, Your Honor. Thank you very
6 much.

7 THE COURT: Very well. Thank you.

8 MS. ALBANESE: Thank you, Your Honor.

9 THE COURT: Okay.

10 (Whereupon these proceedings were concluded at
11 11:21 AM)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.



Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501

Date: March 28, 2022